

## **EXHIBIT C**

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UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

Confederated Tribes and Bands of the	)	
Yakama Nation	)	No. 06-71182
	)	
Petitioner,	)	
v.	)	Second Declaration of
Bonneville Power Administration,	)	Gregory K. Delwiche
	)	
Respondent.	)	
	)	

I, Gregory K. Delwiche, hereby state and declare:

1. I am the Vice President for Environment, Fish and Wildlife at the Bonneville Power Administration (BPA). I have recently submitted a declaration (hereinafter “First Declaration”) to this Court as Exhibit A to BPA’s March 3, 2006 filing in *Northwest Environmental Defense Center, et al. v. Bonneville Power Admin.*, Docket #06-70430, which involves a challenge to BPA’s actions related to the continued funding of the Fish Passage Center (Center). My First Declaration from that filing is hereby incorporated by reference in this current declaration in its entirety. This second declaration provides information relevant to the case brought by Yakama Nation, which is similar to the challenge brought by NEDC.

2. As described in my First Declaration, BPA received direction from Congress in the form of a Conference Committee Report in November 2005 to make no new obligations to the Fish Passage Center and to ensure an “orderly transfer,” within just 120 days, of the primary data collection and monitoring functions called for in the Pacific Northwest Power Planning and Conservation Council’s Fish and Wildlife Program (“Program”) that the Center has been performing. I did not think it would be prudent or advisable for BPA to simply ignore this unambiguous Congressional direction. BPA thus began a Request for Proposal process, which led to the selection of two new contractors – Pacific States Marine Fisheries Commission (Pacific States) and Battelle Pacific Northwest

National Laboratory (Battelle) – and the proposal of a third – Columbia Basin Fish and Wildlife Authority (CBFWA) – to assume all such functions.

3. Battelle executed its contract with BPA on February 28, 2006. Pacific States' statement of work has largely been completed. *See* Exhibit B. Pacific States is expected to execute its contract with BPA during the week of March 13, 2006, after Pacific States' contracting officer returns from vacation. CBFWA is deferring further consideration of its proposed role pending the Court's decision on the stay motions to stay in this case and in *NEDC v. BPA*.

4. Throughout the Request for Proposal and current contracting processes, I have been sensitive to listening to the opinions of the Tribes in the region, including the Columbia River Inter Tribal Fish Commission (Inter-Tribe), of which the Yakama Nation is a member tribe. While it is ultimately up to BPA to select new contractors for the Center functions, I have nonetheless sought and received valuable input from all sources, including the Tribes, on how best to make the transition and ensure that it occurs as smoothly as possible. The tribal representatives I have talked with most frequently are representatives of Inter-Tribe, as well as the Upper Columbia United Tribes Policy Committee. For instance, I met with Inter-Tribe during the Request for Proposals stage to discuss the process with them. In addition, I have agreed at Inter-Tribe's request to pursue the use of Battelle for analysis that Inter-Tribe believes will help the participants in

the *National Wildlife Federation v. National Marine Fisheries Service* remand collaboration process, overseen by Judge Redden. BPA also has proposed that the Yakama Nation, through Inter-Tribe, will have a seat on the new Science Analysis Governing Committee overseeing the science analysis coordinated by Battelle.

5. BPA's approach provides for continuity in implementing the sections of the Council's Program that call for fishery manager coordination and fish passage data gathering, storage, analysis, and dissemination. The only difference is that BPA, in response to unambiguous Congressional direction, will achieve this objective through other capable and existing entities instead of the Center.

6. The central data analysis and reporting tasks in the Center's expiring agreement with BPA have been incorporated nearly verbatim into Pacific States' and Battelle's contracts. *See Exhibit B; see also* First Decl., Exhibits C and J. The more coordination-oriented tasks would be incorporated into the proposed amendments of CBFWA's current contract with BPA. As a result, the tasks included in the contracts with Pacific States and Battelle and proposed to be assumed by CBFWA are consistent with the tasks identified by the Council in its 2003 Mainstem Amendments to the Program.

7. In addition, the contracts with Pacific States and Battelle are for a term of only one year, and are terminable at BPA's convenience. During the initial year, BPA will work with the Council and fisheries managers, including the

Tribes, to assess the effectiveness of these contractors. At the end of this year, BPA will consider whether to keep this structure or to adjust it as appropriate.

8. BPA is committed to making sure that the Yakama Nation and any other interested parties who rely on the data, resources, and analysis of the Center called for in the Council's Program will have that same information available without any interruptions or changes in quality. In fact, Pacific States will keep the Center's website intact, preserving its primary functions related to mainstem Columbia River dam passage. I have no doubt that the selected contractors are more than capable of providing this information in a timely manner. I am committed to working with the new contractors, the Council, and parties throughout the region to ensure that Program-specific information needs are met on a timely basis.

9. I am aware that the Yakama Nation is concerned that former Center functions may not be carried out as well by the new contractors. I have reviewed the Yakama Nation's Motion for Stay filed in this case, as well as the declarations supporting their motion. The motion and declarations both rely heavily on a February 28, 2006, memorandum by Ms. Michele DeHart of the Fish Passage Center to support their claim that the new contractors will not provide data needed for their fisheries management and litigation purposes. *See Exhibit C.* Ms. DeHart's memorandum purports to compare, in summary form, the Center's most

recent work statement to a draft work statement for the Smolt Monitoring Program, which will largely be transferred to Pacific States. But as Ms. DeHart's memorandum itself acknowledges, the transferred Smolt Monitoring Program will replace only "some" of the Center's current work statement.

10. Thus, from the start, it should be recognized that Ms. DeHart's comparison is truly an "apples to oranges" comparison, rather than an "apples to apples" comparison. In other words, Ms. DeHart's memorandum appears to include only the portion of the Pacific States' work statement for the Smolt Monitoring Program but does not include several other important aspects of the new contracts, including: other Center functions that will be assumed by Pacific States; the functions provided by the Battelle contract; the functions proposed to be provided through CBFWA; the functions likely to be provided by other contracts that have been intertwined with the Center's work such as the Comparative Survival Study (CSS); and functions incorporated into projects proposed for BPA funding through the Council's Program in fiscal year 2007.

11. Notwithstanding these obvious deficiencies in Ms. DeHart's comparison, I have asked two qualified members of my staff – Mr. Roy Beaty and Ms. Kimberly Fodrea – to review Ms. DeHart's memorandum and to prepare a memorandum of their own assessing and analyzing her assertions. Mr. Beaty is a Fishery Biologist with 17 years of experience in the Columbia River Basin. This

includes 12 years as a mainstem passage scientist for a fishery management organization and 5 years as a lead for implementing and managing research, monitoring, and evaluation projects that BPA funds under the Council's Program. Ms. Fodrea is a Hydraulic Engineer with 14 years of experience in the Columbia River Basin. She has expertise in both river hydraulic and fish passage issues at the Columbia and Snake River dams. During her 5 years at BPA, she has worked as a fish & wildlife project manager and provided fish passage analyses and policy analyses. Mr. Beaty's and Ms. Fodrea's memorandum is included as Exhibit D.

12. Before describing Mr. Beaty's and Ms. Fodrea's analysis, it is worth noting three points. First, BPA's goal has been and continues to be to provide for as seamless a transition as possible of all of the essential Program functions that the Fish Passage Center has been carrying out to Pacific States, Battelle, and, eventually, CBFWA, in a manner that ensures that we have both remained consistent with the Program and also effectively responded to the unambiguous Congressional direction in the Conference Committee Report within 120 days.

13. Second, even though our focus is on transferring these essential functions, BPA has been willing to consider the addition of other tasks in some related areas to continue services that are outside of what is required by the Program but nonetheless are closely intertwined with fish passage. These include Gas Bubble Trauma (GBT) monitoring and collecting; maintaining and reporting

secondary data for dam operations (e.g., flow and spill levels); and maintaining and reporting secondary data for basic water quality parameters (e.g., total dissolved gases and temperature). In the Request for Proposals, we invited sponsors to propose additional (“expanded”) tasks, provided that they were within the scope of the 2003 Mainstem Amendments and satisfied other explicit concerns related primarily to objective oversight of scientific analysis.

14. Third, we continue to have ongoing discussions with Pacific States and Batelle to help identify, clarify, and satisfy additional tasks for technical support, and to ensure these tasks are included as appropriate in their respective scopes of work. This should come as no surprise as BPA attempts to sort out, in the relatively short timeframe it was given, how best to separate the independent and neutral science function from the policy and coordination functions that were formerly all performed by the Center. Accordingly, Pacific States’ and Battelle’s contracts may be amended from time to time to include additional work tasks. Ms. DeHart’s memorandum appears to overlook this fact. In short, Ms. DeHart’s memorandum reflects only a limited perspective of a partial “snapshot in time” of one element of a broader, in-progress transition process.

15. Regarding Mr. Beaty’s and Ms. Fodrea’s analysis of Ms. DeHart’s memorandum, the analysis they provide in their memorandum largely speaks for itself. *See Exhibit D.* It is clear from their analysis that most of the alleged

“changes” noted in the DeHart memorandum are explained by the three points discussed above, as well as by the fact that Ms. DeHart compared the former Center functions to only a portion of the full scope of work to be performed by the new contractors, rather than the full scope of work.

16. Concerning the specific work elements that Ms. DeHart claims were eliminated, it appears that Ms. DeHart is largely mistaken. All but one of these work elements are covered either in the contract with Battelle or as a duty to be assumed by CBFWA as proposed. For work elements that are no longer expressly identified, technical support for these work elements still will be available to agencies and tribes upon request from Battelle as part of Battelle’s scope of work, and therefore have not been eliminated. *See Exhibit D.*

17. Concerning specific milestones that Ms. DeHart claims were deleted, Ms. DeHart appears to misunderstand the purpose of milestones in contracts for fish and wildlife projects. Milestones are merely steps leading up to a deliverable, and do not represent a deliverable in and of themselves. Thus, revisions to milestones are largely inconsequential when it comes to determining what functions have been carried over to the new contractors. That said, many of the allegedly deleted milestones have in fact been made a part of the work scope of the appropriate contractor, whether it be Battelle, Pacific States, or as proposed CBFWA. *See Exhibit D.* This approach brings the work statements for the new

contractors in line with the essential functions described in the 2003 Mainstem Amendments, and also provides a clearer delineation between the independent and neutral science function and the policy and coordination functions.

18. In summary, because of its “apples to oranges” comparison and other deficiencies described above, it is my opinion that Ms. DeHart’s memorandum is of little to no value in assessing the transition of functions from the Center to the new selected contractors. It is still my full expectation that the Yakama Nation and others in the region will have the same information available without any interruptions or changes in quality.

19. I am also aware that the Fish Passage Advisory Committee (FPAC) has recently prepared a memorandum dated February 16, 2006, that purports to list current Center services that are not covered in the Pacific States and Batelle contracts. The memorandum also contains a list of duties currently performed by the Fish Passage Center for state, tribal and federal fishery agencies. This memorandum is attached to the Declaration of Thomas K. Lorz in the Yakama Nation’s Motion for Stay filed in this case.

20. I have reviewed the FPAC memorandum in detail. The memorandum makes some general statements about eliminating staff, but I believe that BPA has put in place a set of contracts that will continue to provide the functions that these staff have provided. Regarding the list of Center duties, these duties will almost

entirely be assumed by Pacific States, Batelle, and if they are willing, CBFWA, with the appropriate tasks going to the appropriate entity. It is also worth noting that BPA has actually already used the list of duties in the FPAC memorandum, in part, to enhance the clarity regarding the roles and responsibilities of Pacific States, Battelle, and CBFWA under their new or amended contracts. In particular, this memorandum has been used to help guide our discussions with Pacific States and Battelle regarding the distinction between routine and non-routine data analyses that these entities will be providing under their new contracts with BPA. Thus, nothing in the FPAC memorandum undermines a conclusion that the essential functions of the 2003 Mainstem Amendments will continue to be fully carried out, and that resulting data, resources, and analysis will be provided in a timely manner and with no change in quality to parties who use this information such as the Yakama Nation.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, based on my education, experience, and professional judgment.

Executed on March 13, 2006, in Portland, Oregon.



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Gregory K. Delwiche  
Vice President Environment, Fish and Wildlife  
Bonneville Power Administration